ORIGINAL

No. 90-6352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DIANE GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a conviction for a multiple-object conspiracy must be set aside where the jury returns a general verdict and the evidence is insufficient to support one of the objects of the conspiracy.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-6352

DIANE GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
FOR THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-54) is reported at 913 F.2d 337.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] The petition appendix is unpaginated. Our citations to the petition appendix refer to the page numbers of the court of appeals' slip opinion reproduced there.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. She received a suspended sentence and was placed on probation for five years on condition that she participate in a work release program for the first six months of probation, obtain and maintain employment, and perform 500 hours of community service. The court of appeals affirmed. Pet. App. 1-54.

1. From 1980 to 1986, Alex Beverly controlled a large narcotics operation in Chicago, Illinois. Pet. App. 2-7. In 1988, a grand jury returned a 23-count indictment against Beverly, Betty McNulty, petitioner, and others arising from Beverly's drug operation and his attempts to conceal assets and income. Count 20 charged that Beverly, McNulty, and petitioner participated in a conspiracy to defraud the federal government through two means: (1) impairment of the efforts of the Internal Revenue Service to ascertain income taxes (the IRS object); and (2) impairment of the efforts of the Drug Enforcement Administration to ascertain forfeitable assets (the DEA object).[2]

The evidence showed that Beverly held and controlled assets in the names of both McNulty and petitioner. He arranged for McNulty to becom[illegible]without capital contribution) the majority shareholder of Blacom Corporation, a company that Beverly used to

[2] The petition appendix contains a copy of Count 20 of the indictment.

control various properties he acquired through his drug operation. Pet. App. 10-12. Beverly also placed real estate and a Mercedes Benz automobile that he used in McNulty's name. Id. at 12-13. Following the same modus operandi, Beverly purchased a tavern and an adjoining building in petitioner's name, and petitioner filed tax returns claiming the tavern as her own to conceal Beverly's ownership of the business and his underreporting of related income. Id. at 13, 44 & n.33. Beverly also purchased a $35,000 Jaguar automobile in petitioner's name, and Beverly and petitioner structured the payments to evade federal reporting requirements for cash payments in excess of $10,000 (26 U.S.C. 6050I). Pet. App. 14 & n.8, 44.

During the trial, petitioner unsuccessfully moved for severance, arguing that the government had failed to prove that petitioner knew Beverly was a drug dealer or that petitioner was aware of the DEA object of the conspiracy. Pet. App. 19. At the close of the trial, petitioner proposed a jury instruction that would have required the jury to find that petitioner knew that the object of the conspiracy was to impede the IRS in ascertaining Beverly's taxes. Ibid. She also asked the court to require the jury to identify, through special interrogatories, whether petitioner had knowledge of the IRS and DEA objects of the conspiracy. The court denied both the proposed jury instruction and the request for spec-

ial interrogatories. The jury returned a general verdict against Beverly, McNulty, and petitioner on the conspiracy count. Ibid.[3]

2. The court of appeals affirmed petitioner's conviction. The court of appeals first found that there was sufficient evidence to convict petitioner for participation in the IRS object of the conspiracy. Pet. App. 43-46. The court then rejected petitioner's contention that her conviction should be vacated because it was impossible to determine from the general verdict whether she was convicted of conspiracy to defraud the IRS--which the government had demonstrated through sufficient evidence--or for conspiracy to defraud the DEA--which the government conceded that it had failed to prove. The court explained that where the indictment charges a multiple-object conspiracy, a general verdict can stand as long as there is sufficient evidence to support one of the objects of the conspiracy. Id. at 43, 46-53.

ARGUMENT

Petitioner seeks review of a single issue: whether a conviction for a multiple-object conspiracy must be set aside if, as in this case, the evidence is insufficient to support one of the objects of the conspiracy. In our view, the court of appeals correctly resolved that issue, holding that petitioner's conviction must be affirmed if there is sufficient evidence to support any of the objects identified in the indictment. Although we believe the court of appeals' decision is correct, that decision conflicts with

---

[3] The jury also found Beverly, McNulty, and other defendants guilty of various other offenses. Pet. App. 1-2.

decisions of other courts of appeals. Because the underlying issue is important and it arises frequently, this Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits.

1. As this Court has repeatedly emphasized, appellate courts perform a limited function in reviewing jury verdicts. United States v. Powell, 469 U.S. 57, 66-67 (1984); Burks v. United States, 437 U.S. 1, 16-17 (1978); Glasser v. United States, 315 U.S. 60, 80 (1942). The reviewing court does not "weigh the evidence or determine the credibility of witnesses." Ibid. Rather, the sole question for the court is whether there is sufficient evidence to support the jury verdict. Powell, 469 U.S. at 67; Burks, 437 U.S. at 17; Glasser, 315 U.S. at 80. Thus, "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420 (1970). This "general rule" applies in indictments charging crimes, such as conspiracy or racketeering, that involve multiple objects or predicate acts. Thus, the court of appeals correctly held in this case that petitioner's conviction on an indictment charging a dual-object conspiracy should stand because there was sufficient evidence to support one of the objects identified in the indictment. Pet. App. 46-47.

Petitioner contends, nonetheless, that this Court's decision in Yates v. United States, 354 U.S. 298 (1957), requires that her

conviction be set aside. In Yates, the defendant was charged under the Smith Act, 18 U.S.C. 2385, with participating in a conspiracy to advocate the violent overthrow of the government and to organize a society or group for that purpose. 354 U.S. at 300. The Court determined that the district court incorrectly instructed the jury as to the latter object and vacated the conviction (id. at 310-312), stating:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected.

Id. at 312. As the court of appeals correctly explained, Yates dealt with the situation where a jury, incorrectly instructed on the law, might have convicted an individual for engaging in conduct that is not a crime. That rule does not apply where the reviewing court determines that the jury was properly instructed, and where the only flaw in the invalid object is one of evidentiary insufficiency. In that setting, the principle set forth in Turner controls: the jury is presumed to have correctly evaluated the evidence and convicted the defendant on the theory for which there was sufficient evidence. See Pet. App. 46-49, 53.

2. Although the court of appeals' decision is correct, it conflicts with a long line of Third Circuit cases stating that if a defendant is charged with multiple predicate or object offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses the jury relied upon in reaching its verdict. See United States v. Vastola, 899 F.2d. 211,

288 (RICO), cert. granted and judgment vacated on other grounds, 110 S. Ct. 3233 (1990); United States v. Zauber, 857 F.2d 137, 151-152 (1988) (RICO), cert. denied, 489 U.S. 1066 (1989); United States v. Riccobene, 709 F.2d 214, 227 (RICO), cert. denied, 464 U.S. 849 (1983); United States v. Brown, 583 F.2d 659, 669 (1978) (RICO), cert. denied, 440 U.S. 909 (1979); United States v. Tarnopol, 561 F.2d 466, 474 (1977) (conspiracy); United States v. Dansker, 537 F.2d 40, 51 (1976) (conspiracy), cert. denied, 429 U.S. 1038 (1977). See also United States v. Ryan, 828 F.2d 1010, 1015 (1987) (false statements). The Second Circuit, on at least one occasion, had reached a similar result. United States v. Garcia, 907 F.2d 380, 381 (2d Cir. 1990) (conspiracy).

To be sure, it is possible to discount the conflict among the circuits on various grounds. For example, the Third Circuit affirmed the RICO convictions in Vastola and Riccobene, concluding, based on other portions of the jury verdicts, that "the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge." Vastola, 899 F.2d at 228; Riccobene, 709 F.2d at 228. See also Zauber, 857 F.2d at 151-154. Additionally, the Second Circuit's decision in Garcia is inconsistent with other decisions from that Circuit that have upheld dual-object conspiracies where only one of the objects was proved. See United States v. Mowad, 641 F.2d 1067, 1073-1074 (2d Cir.), cert. denied, 454 U.S. 817 (1981); United States v. Papadakis, 510 F.2d 287, 297

(2d Cir.), cert. denied, 421 U.S. 950 (1975). And the approach in other circuits is unsettled. See Pet. App. 51 n.39.[4]

At bottom, however, the conflict between the Third and Seventh Circuits is genuine and is likely to persist. The conflict reflects a fundamental disagreement as to the proper consequences when a reviewing court determines that there is sufficient evidence to support a conspiracy conviction based on some, but not all, of a conspiracy's objects. That disagreement has great practical importance. The federal government frequently prosecutes multiple-object conspiracies in connection with the laws governing controlled substances, racketeering, securities, and financial institutions. Many of those prosecutions involve complex factual situations. Given that complexity, it is not unusual for a reviewing court to conclude that the evidence is sufficient to prove some, but not all, of the objects of the conspiracy identified in the indictment. The cost of retrying those cases is substantial. We accordingly submit that the Court should resolve the longstanding conflict among the circuits.

---

[4] The First, Fifth, Eighth, Ninth, and Eleventh Circuits appear to follow the rule that the Seventh Circuit applied in this case. See United States v. Johnson, 713 F.2d 633, 645-646 & n.15 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); United States v. Halbert, 640 F.2d 1000, 1008 (9th Cir. 1981); United States v. Murray, 621 F.2d 1163, 1171 (1st . Cir.), cert. denied, 449 U.S. 837 (1980); United States v. Phillips, 606 F.2d 884, 886 n.1 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); United States v. Wedelstedt, 589 F.2d 338, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); United States v. James, 528 F.2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JANUARY 1991